WONG YOON MING

v.

MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ANOR.

HIGH COURT MALAYA, SHAH ALAM
WAN YAHYA J
[CRIMINAL APPLICATION NO. 44-29-89]
17 MARCH 1990

CRIMINAL PROCEDURE: *Preventive detention - Application for habeas corpus - Supreme Court's decision on similar order - Whether detention order automatically invalid by Supreme Court's decision - Whether Minister could validly revoke the detention order - Whether Minister empowered to issue fresh detention order - Revocation order and fresh order dated the same day - Whether ambiguity exists as to when each of the two orders takes effect - Sections 6(1), 11A, 11B(1), 11B(2) Dangerous Drugs (Special Preventive Measures) Act 1985.*

STATUTORY INTERPRETATION: *Apparent defect in the provisions of the statute - Lacuna existing between provisions of two subsections - Whether it is the function of the Court to bridge the gap - Casus omissus - Judicial approach - Whether Court can supply words to give legislative efficacy to a statute - Ambiguous provision affecting liberty of the individual - Strict construction of statute.*

On 14 April 1988 an order of detention was made by the Minister under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 (the Act) for a period of 2 years. The order was signed on 14 April 1988 and expressly stated that the applicant was to be detained for 2 years with effect from 16 April 1988. On 14 December 1989 the applicant filed an application for *habeas corpus* which was fixed for hearing on 6 February 1990. In the meantime, the Supreme Court had decided in two similar cases that such an order was invalid. On 5 February 1990, the Minister revoked the previous order and issued a fresh detention order under s. 11B(2) of the Act. The issue for the Court was whether the Minister could validly revoke the previous order, whether he was empowered to issue a fresh order and whether there was any ambiguity as to which of the two orders was in force on that date that is 5 February 1990.

Held:

[1] The fresh order made by the Minister under s. 11B(2) of the Act was invalid as the order was made pursuant to a provision which was apparently defective.

[2] Any statute which restricts the liberty of the subjects must be spelt out in explicit perceptive and unequivocal terms and if there is any ambiguity in the provisions of such law, the construction which is most favourable to the individual should be followed.

[3] It is not the function of the Court to supply words to give legislative efficacy to a statute.

[4] The revocation order made by the Minister was valid as s. 11B(2) of the Act made it clear that it should be made without prejudice to the validity of order before its revocation.

[5] Both the revocation and fresh orders dated the same day must be read together and applying the principle of purposive interpretation, there is no doubt that the revocation order referred to was intended to revoke the order made on 16 April 1988 before the fresh order could come into force.

[Writ of habeas corpus to be issued and applicant to be released forthwith]

Cases referred to:
Tan Hoon Seng v. Minister for Home Affairs [1990] 1 CLJ (Rep) 271
Poh Chin Kay v. Minister for Home Affairs [1990] 2 MLJ (Rep) 297
Zakaria bin Jaafar v. Menteri Hal Ehwal Dalam Negeri [1989] 2 MLJ 691
Gladstone v. Bower [1960] 3 All ER 353
Re Datuk James Wong Kin Min [1976] 2 MLJ 245

Legislation referred to:
Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3, 4, 5, 6(1), (3), 7(3), 11A, 11B (1), (2)

For the applicant - Tan Hock Chuan; M/s. Kam Woon Wah & Co.
For the respondents - Noor Bahari

JUDGMENT

Wan Yahya J:

The relevant facts relating to the application can be shortly summarised as follows: On 14 April 1988 the Deputy Minister for Home Affairs, Malaysia made an order under s. 6(1) for the detention of Wong Yoon Ming (applicant) for a period of two years. The order (Exbt. WYM 1 in enclosure) which was signed by the Honourable Minister on 14 April 1988 expressly directed that the applicant be detained for 2 years at Pusat Pemulihan Akhlak Muar, Johor with effect from 16 April 1988.

On 14 December 1989 the applicant filed an application for an order of *habeas corpus* and the hearing in respect of his application was fixed for 6 February 1990. In the meantime the Supreme Court *vide Tan Hoon Seng v. Minister for Home Affairs* - SCCA 05-51-89 and *Ng Keng Chew v. Minister for Home Affairs* - SCCA 05-53-89 ruled in both cases involving similar issue as this application that the said order was illegal, unlawful and unconstitutional. The decision was cited as an additional ground in the fourth affidavit of the application.

At the hearing of the application on 1 March 1990, Counsel for the respondents in an unprecedented move, informed the Court that a fresh order purportedly made under the authority of s. 11B of the Act has been issued on the applicant by the Minister of Home Affairs on the previous day. Federal Counsel denied that the purpose of such a move was to frustrate the application of Supreme Court Ruling and prevent the applicant from being set at liberty. However the point in time at which the order was taken, the sequence of events which transpired between the filing of this application and the hearing and the contemporaneous revocation of an almost expired order and reissuance of a fresh order do not make the denial too convincing. Albeit, the entire new episode brings into question one point of law that is whether the respondent is empowered by the Act to reissue a fresh order. In his address from the bar table, learned Federal Counsel alluded to s. 11B(2) of the Dangerous Drugs (Special Preventive Measures) Act 1985 but the fresh order (Exbt. MJMA3) itself specifically related the detention to s. 6(1) of the same Act.

The three grounds of application can be briefly outlined as follows:

(i) The revocation order dated 5 February 1990 is illegal,

(ii) the fresh order dated the same date is likewise illegal, and (iii) even if the revoked and fresh orders are valid there is nevertheless doubts as to which of the two orders was in force on that date.

I propose to deal with these grounds (i), (iii) and lastly (ii).

On (i) Counsel submits firstly that if the Minister had been satisfied by the investigation and report that it was necessary to detain the applicant in the first place, he should have been similarly satisfied that it was not necessary to detain him when he issued the revocation order. The rationalisation behind this is that, the Minister's finding that there was no necessity to detain the applicant, must relate back to his previous finding when he had found otherwise. Therefore according to applicant's Counsel this must cast doubts on the existence of sufficient grounds for the earlier detention. Accordingly Counsel submits that the purpose of the revocation and reissuance of first order was intended to get around the illegal order.

Next Counsel submits the fresh order was designed merely to defeat an act which has been prohibited by the decision of the Supreme Court and thirdly it was argued that, as the previous order has been made illegally, the Minister could not have revoked it. A recent decision of the High Court, Ipoh in *Poh Chin Kay v. Minister for Home Affairs* was cited as an authority.

I have been referred to the maxim *quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud*. It is true that in order to carry out effectually the object of a statute, the Courts must so construe it as to defeat all attempts to do so or avoid doing, in an indirect or circuitous manner that which it had prohibited or enjoined but before such construction can be invoked, we have to ask ourselves 'Was the act of the Minister in revoking the previous order illegal?' The Supreme Court decision in *Tan Hoon Seng's* case (*supra*), as I see it, could only be applied to the previous order made by the Minister on 16 April 1988 and that the Supreme Court decision makes no mention and did not even touch on the question of the Minister's subsequent power to revoke the order. On the contrary, the wordings of subsection (2) of s. 11B made it clear that the revocation should be made without prejudice to the validity of the order before its revocation. This effect of the subsection (2), however will not apply to fresh order and if it could be established that the order was illegally made, then I agree that the above canon of construction will apply. Moreover, the Supreme Court decision on another case will not directly and instantaneously invalidate the order made by the Minister on 16 April 1988. Of course this Court is bound by the *ratio decidendi* of the Supreme Court but the applicant has yet to have his case heard when the Minister stole a march by revoking the order. I would hold therefore that the revocation order to be valid by virtue of s. 11B.

As regards ground (iii) Counsel contends that since the revocation and fresh orders were dated the same day, there is a doubt as to the time of coming into force of each order. On the assumption that the previous detention has yet to be revoked at the stroke of midnight, he argues that there was in the earlier part of the day, two detention orders (the previous and the fresh orders) concurrently in force and this must give rise to doubts as to the validity in point of time of each order and also lead to the anomalous state when two orders on the same detainee exist side by side. The case of *Zakaria bin Jaafar v. Menteri Hal Ehwal Dalam Negeri* [1989] 2 CLJ (Rep) 691 which dealt with extension order under s. 11A as contrasted with s. 11B has no application here.

Even if did the rationale or extension order being part of the original order will not be of assistance to the applicant's allegation of the existence of two concurrent orders of detention. However, a somewhat similar issue was discussed in *Hong Siew Sin v. Menteri Hal Ehwal Dalam Negeri* (Supreme Court Criminal Appeal No. 5-128-89) where the learned Chief Justice in dismissing the appeal in the issue on the question of the two orders under s. 6(1) and the extension order under s. 11A bearing the same date said:

Looking at the problem in another way it is not so much the application of the *de minimis* rule but that the extension orders in question should be read as a whole and the words specifying the dates referred to earlier should be ignored either as a genuine mistake or a miscalculation of the dates or a trifling irregularity or simply superfluous - see also *Greene v. Secretary of State for Home Affairs*.

In our present case if, as alleged by the applicant, the revocation and fresh orders were served simultaneously, then both the orders must be read together and reading them as a whole on the principle of purposive interpretation, there is no doubt that the revocation order referred to, and was intended to revoke the order made on 16 April 1988 before the fresh order could come into force.

Ground (ii) of the applicant's petition pertains to the validity of the fresh order itself. The question to be asked is whether the Minister has the power after revoking an order made under s. 6(1) to issue a fresh order. Learned Federal Counsel contends that he could do so under s. 11B(2) of the Act.

Now s. 11B reads:

(1) Notwithstanding anything contained in this Act, the Minister may at any time revoke any detention order made under subsection (1) of s. 6, or any restriction order made under subsection (3) of s. 6, or any suspended detention order, or any direction under subsection (1) of s. 11A for the extension of the duration of any such order, if he deems it just or fit to do so.

(2) Any revocation under subsection (1) shall be without prejudice to the validity of the order or direction before its revocation or to anything done thereunder, or to the power of the Minister to make a fresh order or to give a fresh direction as is mentioned under subsection (1) in respect of the person against whom the order or direction which is revoked was made or given.

It is apparent on reading the above section that although subsection (2) contains reference to the power of the Minister to make a fresh order as mentioned in subsection (1) the latter subsection itself is silent on this subject.

Learned Federal Counsel attributed this omission to drafting error and urges the Court to read into subsection (1) the power to issue such order.

He drew my attention to the time when this subsection was introduced and he suggested that the purpose of subsection (2) was to enable the Minister to correct a defective order. With respect, I am unable to accept this proposition. To start with I cannot find any expression, specifically or impliedly in the section itself or in the marginal notes to suggest the corrective purpose of subsection (2). Even if I do, I failed to see how an error of two days (that is the difference between the operative date of detention and the date the order was signed) should be corrected by a fresh order to detain the applicant for a further two years. The revoked order dated 16 April 1988 was due to expire on 15 April 1990 but the fresh order seeks to detain the applicant until 15 April 1992. If the true and lawful purpose for the issuance of this fresh order is to correct and validate the erroneous order previously made and to enable him to be detained for the full 2 years, then that correction should have been made by directing that the applicant be detained for further period of two months or so which he has yet to undergo to complete his 2 years period and not for an additional two years period.

The words "order" and "direction" in subsection (2) refer to those orders and directions mentioned in subsection (1). These orders as expressly mentioned in sub(1) are:

(i) A detention order made under s. 6(1).

(ii) A restriction order made under s. 6(3).

(iii) A suspended detention order made under s. 7(3) and

(iv) An extension of detention order made under s. 11A.

However, none of these provisions make any mention of a fresh order or contain any authority for the Minister to issue such an order. Even if we were to read such a provision into s. 11B(1), it would nevertheless be inconsistent with various provisions of the Act and in particular render s.11A of the Act superfluous and effete. Indeed if such provision exists, then a detainee can be detained *ad infinitum* by resorting to the process of revocations and fresh orders.

Subsection (2) of s. 11B appears to me to be a mere saving provision to safeguard the validity of the Minister's action made prior to the revocation and the term fresh order is either a *casus omissus* or is intended only to empower the Minister to re institute the entire proceedings afresh by way of fresh investigation on fresh facts in accordance with ss. 3, 4 and 5 of the Act. Learned Federal Counsel concedes that subsection (2) made no mention of the power of the Minister to make a fresh order but he requested me to read into that subsection the term which was used in subsection (2). Even if we were to do so and rule that the Minister may issue a fresh order under s. 11B(1), we will nevertheless be in no position to read into that sub-section the necessary terms, conditions, limitation, and extent of the Minister's powers. Mere provision for a fresh order without qualification as to the time of detention is no doubt an ambiguous provision. There is a lacuna between the provisions of these two subsections and I have been asked to bridge this gap by adopting a construction conforming with what the learned Federal Counsel claimed to be the intention of the legislature but I am afraid such intention is indeterminable from the term 'fresh order' employed in subsection (2). There is therefore an apparent defect in respect of this provision. The judicial approach towards *casus omissus* is outlined by Devlin LJ in *Gladstone v. Bower* [1960] 3 All ER 353 at 358 as follows:

> I think, therefore, that this is simply *casus omissus* and the Act is defective. If it were ever permissible for the Court to repair a defective Act of Parliament, I should be very glad that the Court should do so in this case so far as the Court could. The Court will always allow the intention of a statute to override the defects of wording but the Court's ability to do so is limited by the recognised canons of interpretation. The Court may, for example, prefer an alternative construction which is less well fitted to the words but better fitted to the intention of the Act. But here for the reasons given by the learned Judge there is no alternative construction; it is simply a case of something being overlooked. We cannot legislate for *casus omissus*. I may be sure in this case that I know exactly what Parliament would do if it perceived a gap. But, if the rules were to be relaxed, sooner or later the Court would be saying what Parliament meant and might get it wrong and thus usurp the law-making function. It is a matter of keeping within the recognised canons and they do not permit the Court to supply words if the only (and I emphasise only) ground for their admission is to give legislative efficacy to a statute.

Whichever construction we apply there is no doubt that it arose out of ambiguity. Any statute which restricts the liberty of the subjects must be spelt out in explicit, preceptive and unequivocal terms. Any ambiguity in the language used must be subjected to strict construction. The normal role of construction demands that they should be interpreted, if possible, as to respect the rights of the citizen and if there is any ambiguity in the provision

of such laws the construction which is favourable to the individual should be followed. The principle of this construction was discussed at length by Lee Hun Hoe CJ Borneo in *Re Datuk James Wong Kin Min* [1976] 2 MLJ 245:

> In a matter so fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. Where personal liberty is concerned an applicant who applies for a writ of *habeas corpus* is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty ... An inherent part of their (the Courts') function is to see that the executive acts within the law and does not encroach unnecessarily in the realm of liberty of the subject ... If this constitutional guarantee (of Article 5(1) is to have any real meaning at all, then it is imperative that the Courts should intervene whenever the liberty of the subject is encroached upon not in accordance with the law.

Since then Hashim Yeop A. Sani SCJ (as he then was) when dealing with this aspect of construction said in *PP v. Koh Yoke Koon*:

> Detention not in accordance with law is inconsistent with the fundamental right guaranteed under Article 5(1) of the Constitution. Where a law deals with detention, there are abundant authorities to show that the provisions of such a law must be construed strictly and in the case of doubt the Court should lean in favour of the subject. See also *Andrew s/o Thamboosamy v. Superintendent of Pudu Prison, Kuala Lumpur*.

Recently as Chief Justice Malaya he again expressed in the very case cited earlier, *Tan Hoon Seng v. Minister for Home Affairs & Pengarah, Pusat Pemulihan Akhlak, Pulau Jerejak, Pulau Pinang*, SC Cr. App. 05-51-89 that:

> The law of preventive detention must be construed strictly and in the case of doubt the Court should lean in favour of the subject.

The term 'fresh order' was never used, before the insertion of s. 11B(2), in any part of the Act and I cannot see how it could be construed to apply to s. 6 or any other section of the Act.

Applying the principle enumerated above, with particular regard to the lacuna and ambiguity in the provisions concerned, I hold that s. 11B does not and is not intended to empower the Minister to simultaneously revoke and issue a fresh order under s. 6(1) and in any event the direction to detain the applicant for a further two years on a fresh order was never provided for in s. 11B or s. 6 and therefore *ultra vires* the Act.

For these reasons, I find that the applicant had succeeded in making out under ground (ii) of his application that his detention was not in accordance with the law. I therefore make the order for the issue of a writ of *habeas corpus* for the applicant to be released forthwith.

Also found at [1990] 2 CLJ 316